No. SC92288

IN THE SUPREME COURT OF MISSOURI

JAMES MARCUS HILL,

Respondent,

v.

MISSOURI DIRECTOR OF REVENUE,

Appellant.

RESPONDENT'S BRIEF

Appeal From Montgomery County Circuit Court, Twelfth Judicial Circuit
The Honorable Wesley C. Dalton, Judge

Transferred From Eastern District Court of Appeals Before Opinion
Originating Appellate No. ED97218

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes, Constitution, and Court Rules

JURISDICTIONAL STATEMENT

This is an appeal from the Montgomery County Circuit Court's final judgment reinstating Respondent's driving privileges following an administrative ten year denial and revocation by Appellant. The trial court's judgment was based, in part, on a finding that Section 302.060.1(9) R.S.Mo. is unconstitutionally vague.

This cause was originally filed in the Eastern District Court of Appeals and was transferred to this Court by the Eastern District on its own motion prior to opinion, because this Court has exclusive appellate jurisdiction in all cases involving the validity of a statute of the State of Missouri. Mo. Const. art. V., Section 3, and the validity of Section 302.060 R.S.Mo. is in issue.

SUPPLEMENTAL STATEMENT OF FACTS

This was a bench trial before the Honorable Wesley C. Dalton of the Twelve Judicial Circuit sitting in Montgomery County, Missouri, for reinstatement of Respondent's driving privilege pursuant to Section 302.060.1(9) R.S.Mo. Appellant filed an Answer to the Petition filed by Respondent (L.F. 18). Neither Appellant nor counsel for Appellant appeared at the trial (Tr. 3).

Appellant herein claims that the trial court's "comments at trial show that it based its judgment" upon a collateral attack on Respondent's prior conviction. Consequently, Respondent sets forth below the trial court's comments, which occur at pages 10-13 of the transcript:

> MR. STINGLEY: Judge, the Department of Revenue has cited a case of - -
>
> THE COURT: Mayfield vs. DOR.
>
> MR. STINGLEY: - - Mayfield vs. Department of Revenue. They cited it with an Eastern District number, but I think the number is 335 Southwestern 3rd 572. In that case - - That case, I would submit to the court, is significantly different than our case. The factual situation is in that case there was a crack pipe that the individual was arrested for. This case, this Mayfield case was particular to that crack pipe. It was not a wooden box. It was not a smoking device. It was legally sold in a retail establishment in one of the larger cities in the state. That can also be used to smoke items that were

also sold on a legal basis from the same retail establishment.

The Mayfield, case clearly they had a crack pipe that was directly connected to drugs or controlled substances. In this case there's no evidence that this particular thing that Mr. Hill was cited for was directly connected with or related to drugs.

There is the conviction for drug paraphernalia, but again the item that he was convicted of could have been used for many different things, not the least of which is perfectly legal to possess, to use. And so I would submit that extending this Mayfield case to items of that nature would be very similar to, you know kids now days they're putting drugs in cigarettes, they're buying cigars and hollowing out the inside and putting drugs inside cigars to use. All of those things are legal to have, a cigar. It's legal to have a cigarette so are we going to extend Mayfield to say that a cigarette is now drug paraphernalia that precludes someone from getting their license back after all they have gone - - Mr. Hill's case has gone almost, well a little over eleven years, or are we gonna extend it to those types of things that are perfectly legal to have.

I would suggest to the Court that the Mayfield case is quite different. And in addition, I would suggest to the Court that the specific statute of 302.060.1(9) would be unconstitutional if the Court extends that beyond

something that is specifically related to drugs, such as a crack pipe. There's not any rational relationship between legal cigars, legal signatures [sic] or wooden box or this other item that Mr. Hill testified to that he had or a corn cobb pipe. All of those can be conceivably used to ingest illegal drugs. They can also be used to ingest perfectly legal substances that are sold on a retail basis throughout the State of Missouri.

And so I would suggest to the Court there's no rational relationship between the two and that the statute if it's extended would be unconstitutionally vague to be enforced in that basis.

THE COURT: Well, I don't necessarily disagree with you. You can handle the appeal cause I'm gonna go ahead and grant the petition. I tend to agree with what you have said. The problem that we're going to have is DOR is going to probably appeal this and come back and say well it says that it's drug related, you know, and that's very vague on what it is. It says he can't have any conviction for a drug related case with the last ten years and they're looking at pleading guilty or being found guilty of possession of drug paraphernalia as a drug related case. I agree with you that if you go to Aardvarx and you buy a pipe, you know, and you're holding that pipe in your hand it's not illegal at all, but as soon as you put some marijuana into it and take a few puffs if there's resin or whatever in it, you know, then

maybe it's become drug paraphernalia. I think a corn cobb pipe could become drug paraphernalia, also, you know, but if a guy's walking down the street with his corn cobb pipe and all he ever smoked in it was tobacco if the law enforcement charges him with possession of drug paraphernalia because they thought it was marijuana and it turns out it wasn't and he hires his lawyer who's gonna get that case thrown out. If he did have marijuana in it, okay. We'll pay our fine, drug paraphernalia, and go on our way, then maybe it was drug related.

You know, I don't know that there's anything in this one other than the fact that he happened to have this, according to your testimony, that he happened to have this pipe. I know that they're going to argue the opposite that I've got to make a finding that he didn't have a drug related conviction in the last ten years so I'm going to go ahead and grant your Motion for the Reinstatement of Driving Privileges and let you deal with it from there.

MR. STINGLEY: Okay. Thank you, your Honor.

(Tr. 10-13.)

POINT I

APPELLANT'S CLAIM OF TRIAL COURT ERROR ALLEGING AN IMPROPER COLLATERAL ATTACK UPON RESPONDENT'S PRIOR CONVICTION MUST FAIL BECAUSE THE TRIAL COURT'S FAILURE TO MAKE A SPECIFIC FINDING **OF HOW** THE STATUTORY LANGUAGE OF SECTION 302.060.1(9) RSMO. IS UNCONSTITUTIONALLY VAGUE IS NOT PRESERVED FOR REVIEW IN THAT APPELLANT DID NOT RAISE SUCH CONTENTION IN A POST-TRIAL MOTION AS REQUIRED BY RULE 78.07(c); AND THE TRIAL COURT'S COMMENTS DO NOT MAKE IT APPARENT THAT THE TRIAL COURT ENGAGED IN A COLLATERAL ATTACK UPON THE PRIOR CONVICTION, NOR WAS THERE SUCH COLLATERAL ATTACK; BUT RATHER, THE TRIAL COURT SPECIFICALLY FOUND SECTION 302.060.1(9) TO BE UNCONSTITUTIONALLY VAGUE, AND THE SAME IS UNCONSTITUTIONALLY VAGUE BECAUSE THE LANGUAGE DOES NOT GIVE FAIR AND ADEQUATE NOTICE OF THE PROSCRIBED CONDUCT AND LESSEN THE POSSIBILITY OF ARBITRARY AND DISCRIMINATORY ENFORCEMENT.

Mayfield v. Dir. of Revenue, 335 S.W.3d 572 (Mo.App. E.D. 2011)

Pickering v. Pickering, 314 S.W.3d 822 (Mo.App. W.D. 2010)

Cocktail Fortune v. Sup'r of Liq. Control, 994 S.W.2d 955 (Mo.banc 1999)

State ex rel. Nixon v. Telco Dir. Pub., 863 S.W.2d 596 (Mo.banc 1993)

Section 195.010 RSMo.

Section 195.233 RSMo.

Section 302.060 RSMo.

Missouri Supreme Court Rule 78.07

Missouri Supreme Court Rule 84.04

POINT II

APPELLANT'S CLAIM THAT THE TRIAL COURT ERRED BY ADJUDICATING THE CONSTITUTIONALITY OF SECTION 302.060.1(9) R.S.MO. BECAUSE SUCH ISSUE WAS NOT PROPERLY BEFORE THE TRIAL COURT MUST FAIL BECAUSE THE CLAIM WAS PROPERLY BEFORE THE TRIAL COURT IN THAT THE PLEADINGS WERE AMENDED BY IMPLIED CONSENT UNDER RULE 55.33(B), BECAUSE APPELLANT FAILED TO APPEAR AT THE TRIAL HEREIN AND FAILED TO OBJECT TO THE RESPONDENT'S EVIDENCE AND ARGUMENT, AND THE ISSUES RAISED AT THE TRIAL, ALTHOUGH NOT RAISED IN THE PLEADINGS, SHALL BE TREATED IN ALL RESPECTS AS IF THEY HAD BEEN RAISED IN THE PLEADINGS, THEREFORE THE CLAIM THAT SECTION 302.060.1(9) IS UNCONSTITUTIONAL WAS PROPERLY BEFORE THE TRIAL COURT.

Leahy v. Leahy, 858 S.W.2d 221 (Mo.banc 1993)

Murray v. Ray, 862 S.W.2d 931 (Mo.App. S.D. 1993)

Grider v. Tingle, 325 S.W.3d 437 (Mo.App.S.D. 2010)

Dye v. Div. of Child Support Enforcement, 811 S.W.2d 355 (Mo.banc 1991)

Section 302.060 RSMo.

Missouri Supreme Court Rule 55.33

POINT I

APPELLANT'S CLAIM OF TRIAL COURT ERROR ALLEGING AN IMPROPER COLLATERAL ATTACK UPON RESPONDENT'S PRIOR CONVICTION MUST FAIL BECAUSE THE TRIAL COURT'S FAILURE TO MAKE A SPECIFIC FINDING **OF HOW** THE STATUTORY LANGUAGE OF SECTION 302.060.1(9) RSMO. IS UNCONSTITUTIONALLY VAGUE IS NOT PRESERVED FOR REVIEW IN THAT APPELLANT DID NOT RAISE SUCH CONTENTION IN A POST-TRIAL MOTION AS REQUIRED BY RULE 78.07(c); AND THE TRIAL COURT'S COMMENTS DO NOT MAKE IT APPARENT THAT THE TRIAL COURT ENGAGED IN A COLLATERAL ATTACK UPON THE PRIOR CONVICTION, NOR WAS THERE SUCH COLLATERAL ATTACK; BUT RATHER, THE TRIAL COURT SPECIFICALLY FOUND SECTION 302.060.1(9) TO BE UNCONSTITUTIONALLY VAGUE, AND THE SAME IS UNCONSTITUTIONALLY VAGUE BECAUSE THE LANGUAGE DOES NOT GIVE FAIR AND ADEQUATE NOTICE OF THE PROSCRIBED CONDUCT AND LESSEN THE POSSIBILITY OF ARBITRARY AND DISCRIMINATORY ENFORCEMENT.

Standard of Review

In regard to the claimed error of an impermissible collateral attack on Respondent's prior conviction, "[t]he trial court's judgment will be affirmed unless there

is no substantial evidence to support it, it is against the weight of the evidence or it erroneously declares or applies the law." *Mayfield v. Dir. of Revenue*, 335 S.W.3d 572, 573 (Mo.App. E.D. 2011).

This Court reviews constitutional challenges de novo, *State v. Spilton*, 315 S.W.3d 350, 357 (Mo.banc 2010), and statutory interpretation de novo. *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 564 (Mo.banc 2010).

Analysis

The statute at issue herein is Section 302.060.1(9) R.S.Mo. That statute provides that the Missouri Director of Revenue shall not issue a license and shall deny any driving privilege to persons having more than two driving while intoxicated convictions, but it provides a limited exception once a person has gone more than ten years since the prior conviction. The trial court found the statutory language unconstitutionally vague. The pertinent portion of the statute reads as follows:

> "If the court finds that the petitioner has not been convicted of any offense related to alcohol, controlled substances or drugs during the preceding ten years and that the petitioner's habits and conduct show such petitioner to no longer pose a threat to the public safety of this state, the court may order the director to issue a license to the petitioner...." Section 302.060.1(9).

Following a bench trial, the trial court herein found that "Petitioner has not been

convicted of any offense related to alcohol, controlled substances or drugs during the preceding ten years" (L.F.26, ¶ 22). The trial court further found "that the phraseology utilized in Section 302..060.1(9), to wit: 'if the court finds that the petitioner has not been convicted of any offense related to alcohol, controlled substances or drugs during the preceding ten years....' is unconstitutionally vague" (L.F. 27, ¶ 24). The trial court did not state that the second said finding was the basis for the first finding. It made two separate findings (L.F. ¶22 & ¶24).

Appellant's point relied on identifies the "challenged ruling", under Rule[1] 84.04, as the reinstatement of Respondent's driving privileges and claims the trial court erroneously declared and applied the law in reinstating his driving privileges. Appellant's Point I claims the legal reason for the error is because the trial court engaged in an improper collateral attack on Respondent's prior conviction; and that the alleged improper collateral attack is apparent from the record because (a) the trial court made no findings of how the actual language was unconstitutionally vague, and (b) the trial court's comments showed it based the judgment on whether the item Respondent was convicted of possessing was drug paraphernalia. Appellant's point relied on does not challenge the actual finding that the statute is unconstitutionally vague.

More specifically, Appellant's point I, states that the first "legal reason, in the context of the case", which "support[s] the claim of reversible error", as required in Rule

84.04(d), is that the trial "court made no specific finding demonstrating how the actual language of Section 302.060.1(9) [is] unconstitutionally vague" (Appellant's Brief, Point I, p.7).

This portion of Appellant's claim must fail because it was not preserved for appellate review pursuant to Rule 78.07(c).

"In all cases, allegations of error relating to the form or language of the judgment, including the failure to make statutorily required findings, must be raised in a motion to amend the judgment in order to be preserved for appellate review." Rule 78.07(c). *See also Pickering v. Pickering*, 314 S.W.3d 822, 830 (Mo.App. W.D. 2010). This court generally will not convict a trial court of error on a matter that was not put before it to decide. *Smith v. Shaw*, 159 S.W.3d 830, 835 (Mo.banc 2005).

Appellant's complaint relates to the form or language of the judgment, and that the trial court failed to make a specific finding of how the language is unconstitutionally vague. In essence, Appellant's complaint is that the trial court failed to state why it made the decision it did and because it didn't state its reasons, it must have been a collateral attack on Respondent's prior conviction. If Appellant wanted to complain about the trial court not explaining its actions, then it had ample time to do so by filing a post-trial motion. Appellant filed no post-trial motion complaining that the trial court didn't explain its findings. Indeed, Appellant filed no post-trial motion at all.

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[1]All references herein to a "Rule" refer to the Missouri Supreme Court Rules.

The purpose of Rule 78.07 (c) is to bring matters to the attention of the trial court before filing an appeal on the basis of something that the trial court could have easily corrected. *See Murray v. Murray*, 318 S.W.3d 149, 156 (Mo. App. W.D. 2010).

Appellant could have easily filed a post-trial motion to request the trial court to explain why it made the decision that it did. Appellant chose not to do so, but instead now complains, for the first time, to this Court that the trial court didn't explain its basis. Appellant could have and should have raised this issue first with the trial court. Appellant didn't. Appellant's complaint to this Court on this basis is not preserved for judicial review. It was, therefore, waived and must fail.

Appellant next contends that the alleged improper collateral attack is apparent from the trial court's comments. Appellant contends the comments show that the trial court based its judgment on whether the particular item Respondent was convicted of possessing should have qualified as drug paraphernalia under Section 195.233, and that the vagueness "finding was not based on the language of the statute, but instead centered on the alleged facts underlying Hill's 2005 conviction for possession of drug paraphernalia". (Appellant's brief, p. 9). Such is not the case.

What Appellant is really suggesting is that this Court convict the trial court of error because of a conversational exchange between the trial court and Respondent's counsel during closing argument by engaging in guesswork about the basis for the trial

court's ruling.[2] Respondent suggests such would be an unfair speculative journey into the trial judge's mind without foundation and in contravention of the trial judge's specific findings. Appellant could have filed a post-trial motion if it wanted to inquire into or complain about the trial court's findings, or to request a new trial, present evidence, present argument, or otherwise. Better yet, if Appellant had appeared at trial it could have requested findings of fact and conclusions of law. Appellant neither appeared at the trial nor filed any no post-trial motion, and, the record does not "show" that the trial court found the subject statute unconstitutional or based its judgment "on whether the particular item that Hill was convicted of possessing should have qualified as drug paraphernalia under Section 195.233, RSMo." as averred in Appellant's Point I.

Respondent suggests to the Court that the finding of vagueness was based exactly upon what the trial court said it was based upon in paragraph 24 of the Judgment, i.e., upon the language of the statute in the words "convicted of any offense related to alcohol, controlled substances or drugs" (L.F. 27 (Judgment), ¶ 24). Respondent further suggests that the trial court's separate finding that "[p]etitioner has not been convicted of any offense related to alcohol, controlled substances or drugs during the preceding ten years" is not an erroneous application or declaration of the law.

Respondent admits a conviction for possession of drug paraphernalia in 2005 (Tr.

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[2] Respondent has included in this Brief a Supplemental Statement of Facts which sets forth the entire conversational exchange between the trial court and Respondent's

5, Line 19). Indeed, Respondent attached to his Petition a copy of his Missouri State Highway Patrol Criminal History Record which clearly showed the conviction (L.F. 15). Respondent has not challenged that conviction herein.

Appellant cites *Kayser v. Dir. of Revenue*, 22 S.W.3d 240 (Mo.App. E.D. 2000) as supportive of its argument that "[t]he validity of prior criminal convictions cannot be collaterally attacked in actions involving suspended or revoked license cases." (Appellant's brief, p. 12). However, as Appellant correctly points out, *Kayser* involved an action challenging the 10 year revocation of an operator's license. *Kayser* did not involve an action for the reinstatement of an operator's license, which is the issue in the case at bar. Further, even if the rule announced in *Kayser* were to be extended to reinstatement cases, the operator in *Kayser* contended he was not properly advised of his rights or did not knowingly waive his rights at the time of the prior convictions and, therefore, the prior convictions were not valid. *Kayser* at 242. Respondent has not contended anything of the sort in this action. Respondent herein admits the 2005 conviction for possession of drug paraphernalia. No where in the record is any contention by Respondent that he did not suffer such conviction. Thus, while *Kayser* may stand for the proposition that criminal convictions cannot be collaterally attacked in a revocation proceeding, such holding is inapplicable herein because Respondent has not attempted to collaterally attack his conviction and this is a reinstatement case rather than

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counsel.

a revocation case. For the same reasons, the remaining case cited by Appellant, *Crump v. Dir. of Revenue*, 948 S.W.2d 434 (Mo.App. S.D. 1997), is inapplicable to the case at bar.

Although not eluded to in the point relied on, Respondent construes the Argument portion of Appellant's Point I to apparently assert that any and all convictions for the unlawful use of drug paraphernalia under Section 195.233 R.S.Mo. are "related to controlled substances or drugs". (Appellant's brief, p. 11). Matters argued, but not raised in a point relied on are not preserved for appeal. *American Fam. Mut. Ins. Co. V. Nigl*, 123 S.W.3d 297, 300 n.2 (Mo.App.E.D. 2003). Thus, Appellant's argument, not being supported by the "point relied on", is not preserved for appellate review and is waived.

Nevertheless, and if deemed reviewable, the said contention in the argument portion of Appellant's Point I must fail. When there is a constitutional challenge, the language of the statute is to be evaluated by applying it to the facts at hand in the particular case. *Cocktail Fortune v. Sup'r of Liq. Control*, 994 S.W.2d 955, 959 (Mo.banc 1999); *Harris v. Hunt*, 122 S.W.3d 683, 689 (Mo.App. E.D. 2003).

Evaluating the statutory language by applying it to the facts at hand in this case requires the Court to look at the conviction to determine the nature of the offense. The nature of the offense in this matter was possession of an item that was legally purchased at a retail store in downtown Columbia, Missouri (Aardvarx). The trial court did not err by looking at the offense to determine if it was a conviction of an "offense related to

alcohol, controlled substances or drugs", as that is what was required under Section 302.060.1(9) RSMo., *Cocktail Fortune* and *Harris*.

Appellant relies upon *Mayfield v. Dir. of Revenue*, 335 S.W.3d 572 (Mo.App. E.D. 2011). Appellant apparently asserts that the *Mayfield* decision was based merely upon a statutory interpretation and in no way upon the nature of the paraphernalia underlying the conviction. Respondent suggests otherwise. The *Mayfield* court stated:

> "The sole issue raised on appeal is *whether Respondent's* 2007 drug paraphernalia *conviction* under section 195.233 RSMo 2000, *is an offense* related to controlled substances or drugs under Section 302.060.1(9)". Mayfield at 573 *(emphasis added)*.

The *Mayfield* court did not state that the sole issue was whether any conviction under Section 195.233 RSMo was related to controlled substances or drugs. It stated that the sole issue was whether "Respondent's....conviction" was an offense related to controlled substances or drugs. Id.

The *Mayfield* court specifically looked at the item upon which the conviction was based and stated "[d[rug paraphernalia as defined under Section 195.010(17), *particularly a crack pipe*, is *directly* connected to controlled substances and drugs...." *Mayfield* at 574 (*emphasis added*). It then went on to state that "*Respondent's* drug paraphernalia conviction in 2007 is related to controlled substances and drugs." *Mayfield* at 575

(*emphasis added*). Thus, the *Mayfield* court looked only at that particular conviction therein. It did not look at any conviction whatsoever for paraphernalia. The *Mayfield* court further looked not only at the item which was possessed, but also at whether it was directly or indirectly connected to controlled substances or drugs. Respondent suggests that the holding in *Mayfield*, although not specifically stated as such by that court, was in fact limited solely to "Respondent's conviction" of possessing a "crack pipe" which the court found to be "directly connected" to controlled substances and drugs. As a result, the reinstatement in *Mayfield* was denied.

Further, it is important to note that, under the statute, denial of reinstatement essentially occurs if there is a 'conviction for an offense' related to alcohol, controlled substances or drugs. Denial does not occur if there has been a 'conviction related to alcohol, controlled substances or drugs'; nor does denial occur if there has been an 'offense related to alcohol, controlled substances or drugs'. Rather, denial occurs if there has been a '*conviction for an offense* related to alcohol, controlled substances or drugs'.

Respondent in this action did not possess a crack pipe. Indeed, he possessed nothing of the sort. He possessed an item that he legally purchased at a downtown Columbia retail store. There is no evidence that it was an item that was *directly* related to drugs or controlled substances, as in *Mayfield*. The trial court herein looked to the nature of the offense to determine whether it was an "offense related to alcohol, controlled substances or drugs" as it was required to do under *Cocktail Fortune*, *Harris* and Section

302.060.1(9). In so doing, the trial court did not engage in an improper collateral attack upon the Respondent's prior conviction.

It is interesting to note that notwithstanding the trial court's finding that Section 302.060.1(9) is unconstitutionally vague, Appellant has not challenged that finding. No where in it's Points Relied On nor anywhere in it's Brief does Appellant challenge the trial court's finding that the offending phrase is unconstitutionally vague. Appellant only challenges the basis for the finding - but not the finding itself. Matters not raised in a point relied on are deemed waived. *American Fam.*, 123 S.W.3d at 297, n.2.

Nevertheless, it seems to the Respondent, that if both points relied on by Appellant are denied (which Respondent suggests is the proper course), then it does not resolve the question of whether Section 302.060.1(9) is or is not constitutional.

The *Mayfield* court performed some statutory interpretation of §302.060.1(9) RSMo., but it did not have before it the issue of whether the statute was unconstitutionally vague.

This Court has appellate jurisdiction to decide the issue of whether Section 302.060.1(9) is constitutional because the trial court upheld the constitutional challenges. *Dye v. Div. of Child Support Enforcement*, 811 S.W.2d 355, 357 (Mo. banc 1991). The question is whether this Court will engage in a review of that finding, when it has not been preserved for review. In the event this Court does engage in such review, Respondent offers the following.

"The prohibition against vague state laws arises from the Due Process Clause of the Fourteenth Amendment." *State ex rel. Nixon v. Telco Dir. Pub.*, 863 S.W.2d 596, 600 (Mo.banc 1993).

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Cocktail Fortune* at 957 (citations omitted). "The void for vagueness doctrine ensures that laws give fair and adequate notice of proscribed conduct and protects against arbitrary and discriminatory enforcement." *Id.* The test "is whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices". *Id.* Absolute certainty and impossible standards of specificity are not required when determining whether terms are impermissibly vague and greater tolerance is afforded statutes with civil rather than criminal penalties. *Id.*

The vagueness doctrine is rooted in two concepts. "First it is unfair to apply a law to a person who could not have determined in advance what conduct the law permitted and prohibited. Persons cannot fairly be required to obey a law so unclear in its terms that it provides no notice of its scope." *State ex rel. Nixon*, 863 S.W.2d at 600. "Second, a vague law provides no standard to guide or restrict enforcement officials and courts to lessen the possibility of arbitrary and discriminatory enforcement." *Id.*

Applying the foregoing to the case at bar, demonstrates that the phrase "convicted of any offense related to...controlled substances or drugs" in Section 302.060.1(9) is void

for vagueness. As the court in *Mayfield* did, we look to what the Respondent was convicted of possessing - - the offense (not the conviction). The Respondent herein possessed a smokeless pipe hitter and a little wooden box (Tr. 5, L.22-25; and Tr. 6, L.1-4). He purchased them at Aardvarx in Columbia, Missouri. (Tr. 6, L.5-6). Aardvarx is a retail store in downtown Columbia, Missouri (Tr. 6, L.7-9). The items Respondent possessed were for sale in the public view (Tr. 6, L.10-12). They were wholly legal to possess when he purchased them. Respondent could not "have determined in advance" that having in his possession items which he legally purchased, and which were wholly legal to possess at the time of purchase, would later prohibit his obtaining reinstatement of his license to operate a vehicle in the State of Missouri. There is no evidence that Respondent had in his possession any drugs, controlled substances, or residue thereof. Section 195.010(17) defines drug paraphernalia partly as things which could be "objects used....in ingesting" controlled substances. It is undisputed that the items Respondent had in his possession could be "objects used...in ingesting" controlled substances. However, they can also be used for many other purposes which are entirely legal. But, the mere fact that they could be used subjected Respondent to suffer the conviction for possession of drug paraphernalia. It does not mean that Respondent used them in that manner.

The *Mayfield* court stated that "related to controlled substances or drugs...means having *some* connection to controlled substances or drugs." *Mayfield*, 335 S.W.3d at 574

(*emphasis added)*. The *Mayfield* court, however, then went on to talk about the particular item in that case having a *direct* connection. *Id.* (*emphasis added)*. The statute doesn't tell us whether there has to be a *direct* connection, or whether there just has to be *some* connection of some type, however tenuous.

Respondent is mindful of the rule of law that "it is not necessary to determine if a situation could be imagined in which the language used might be vague or confusing". *Cocktail Fortune*, 994 S.W.2d at 959. However, Respondent suggests that the Court should engage in at least some review of possible situations in order to determine whether the claimed vague law provides standards to "lessen the possibility of arbitrary and discriminatory enforcement," as suggested by *State ex rel. Nixon*.

Respondent offers a couple examples as follows. If an individual is convicted of passing a bad check (while not operating a vehicle), and they were high on drugs or alcohol at the time, is that conviction for passing a bad check "related to controlled substances or drugs"? Under the standard of "some" connection, it's difficult to imagine that it would not be related. What if an individual is convicted of violating a city ordinance prohibiting smoking cigarettes within fifteen feet from a public building or other similar cigarette smoking ordinance? Under the standard of "some" connection, it is again difficult to imagine that it would not be a conviction for an offense related to drugs, since nicotine in cigarettes is a drug. Surely that cannot be what the legislature was trying to accomplish by this statute. Further, it is highly unlikely that this statute

gives that person standing outside his building smoking a cigarette a sufficiently definite warning that if he or she is convicted of a city ordinance for such smoking he/she will not be able to get their driving privilege reinstated. Such was the same type of situation here. Respondent purchased an item legally for sale. He then had it in his possession. This statute did not give him sufficient warning that having the item he had was prohibited or that it would prohibit him from obtaining reinstatement of his license. Respondent suggests that the "some" connection standard discussed in *Mayfield* does not lessen the possibility of arbitrary and discriminatory enforcement, rather it increases the possibility of arbitrary and discriminatory enforcement.

The trial court's finding that Section 302.060.1(9) is unconstitutionally vague should be affirmed by this Court. In addition, regardless of whether this Court affirms or reverses the vagueness finding, the trial court's ruling to reinstate Respondent's driving privilege should be affirmed as the trial court did not engage in an impermissible collateral attack on Respondent's prior conviction.

POINT II

APPELLANT'S CLAIM THAT THE TRIAL COURT ERRED BY ADJUDICATING THE CONSTITUTIONALITY OF SECTION 302.060.1(9) R.S.MO. BECAUSE SUCH ISSUE WAS NOT PROPERLY BEFORE THE TRIAL COURT MUST FAIL BECAUSE THE CLAIM WAS PROPERLY BEFORE THE TRIAL COURT IN THAT THE PLEADINGS WERE AMENDED BY IMPLIED CONSENT UNDER RULE 55.33(B), BECAUSE APPELLANT FAILED TO APPEAR AT THE TRIAL HEREIN AND FAILED TO OBJECT TO THE RESPONDENT'S EVIDENCE AND ARGUMENT, AND THE ISSUES RAISED AT THE TRIAL, ALTHOUGH NOT RAISED IN THE PLEADINGS, SHALL BE TREATED IN ALL RESPECTS AS IF THEY HAD BEEN RAISED IN THE PLEADINGS, THEREFORE THE CLAIM THAT SECTION 302.060.1(9) IS UNCONSTITUTIONAL WAS PROPERLY BEFORE THE TRIAL COURT.

Standard of Review

"The trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence or it erroneously declares or applies the law." *Mayfield v. Dir. of Revenue*, 335 S.W.3d 572, 573 (Mo.App. E.D. 2011).

Analysis

Appellant's Point II, avers the trial court erred in reinstating Respondent's driving privileges on the basis that Section 302.060.1(9) R.S.Mo. is unconstitutional because the

issue of constitutionality was not raised in the pleadings. Respondent's Point II does not argue whether Section 302.060.1(9) is or is not constitutional, but rather merely challenges whether the trial court had the authority to hear the issue.

The trial court did have the authority to hear the issue of the constitutionality of Section 302.060.1(9) R.S.Mo.

"When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Rule 55.33(b).

"Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; ***but failure so to amend does not affect the result of the trial of these issues***." Rule 55.33(b) (***emphasis added***).

An issue is tried by express or implied consent where the complaining party fails to object that a matter is beyond the scope of the pleadings. *Leahy v. Leahy*, 858 S.W.2d 221, 226 (Mo. banc 1993). "[E]vidence presented at trial without objection results in an automatic amendment of the pleadings to conform to the evidence and the issues tried by consent." *Murray v. Ray*, 862 S.W.2d 931, 934 (Mo. App. S.D. 1993). "Failure to timely object to evidence beyond the scope of the pleadings constitutes implied consent for a determination of the issues raised." *Grider v. Tingle*, 325 S.W.3d 437, 453 (Mo.App. S.D. 2010).

Appellant relies on *Callier v. Dir. of Revenue*, 780 S.W.2d 639 (Mo. banc 1989). The *Callier* decision was specifically addressed and clarified in *Dye v. Div. of Child Support Enforcement*, 811 S.W.2d 355 (Mo. banc 1991).

"The requirement for specificity in the raising of constitutional points is not designed as an obstacle course for litigants." *Dye*, 811 S.W.2d at 357. "The important inquiry is as to whether the points are presented in such a way that the first court which is required to decide them is able to understand and act on the issues presented." *Id.*

In *Dye* the State of Missouri alleged procedural flaws because the Missouri Attorney General was not notified of the constitutional challenges. This Court rejected such argument and indicated that the purpose of the requirement of notification is to ***permit*** the State of Missouri ***to be heard***. *Id.* at 358.

The *Dye* court also addressed the claim that the constitutional points were defectively presented because they were not raised in the original pleading, but rather added by amendment after the evidence was closed. *See Dye* at 358. This Court in *Dye* stated "[w]e reject the suggestion that a constitutional point not set out in an initial pleading cannot be added by amendment. It is the sense of our rules that amendments be liberally allowed and the principle of relation back be freely applied". *Id.*

In the instant matter, Respondent candidly admits that the constitutional issue was not raised in the original pleading. However, such does not result in the demise of the Respondent's claim that the trial court had the authority to hear the issue. The issue was

tried by implied consent. Consequently, the issue shall be treated in all respects as if it had been raised in the pleadings. Rule 55.33(b). Further, the failure "so to amend does not affect the result of the trial of these issues". Rule 55.33(b).

The State of Missouri was and is a party in this cause. The Director of the Missouri Department of Revenue was served. The Director filed an answer. The Director was given notice of the hearing date. And, the Director failed to show up for the hearing. Respondent and his counsel appeared at the hearing. Respondent presented evidence and argument. The trial court ruled in Respondent's favor. The trial court served a copy of the Judgment and Order of Reinstatement upon the Director. And, the Director did nothing - - except file this appeal. At no time did the Director ever file any post-trial motion with the trial court challenging its authority to render its decision based upon the constitutionality of the statute. Rather, for the first time on this appeal, the Director claims the trial court did not have the authority to hear the issue of the constitutionality of Section 302.060.1(9).

The State of Missouri, via the Director of Revenue for the State of Missouri, clearly was ***permitted*** the opportunity ***to be heard***. It had more than ample opportunity to be heard by the trial court. And now, the State, via the Missouri Attorney General, has had the opportunity to file its brief with this Court and present its arguments and position, yet no where has the State argued that the trial court's finding of unconstitutionality is wrong.

Apparently, the Director had better things to do on the date of trial than to show up for the trial. And, apparently, such was the case for the thirty days post judgment that the Director could have filed a post-trial motion with the trial court alleging that which it has alleged before this Court, thereby giving the trial court an opportunity to hear the Appellant's complaints.

The Director never telephoned the trial court to advise why it was not appearing, nor to this day has the Director ever stated why it was not present for the trial. Indeed, there is no real cause to believe that the Director would have appeared for trial even if the constitutional challenges had been set forth in the original pleading. Appellant's brief mentions only "[h]ad the Director known that a constitutional challenge would be asserted against the statutory reinstatement requirements, ***she likely would have*** elected to attend the hearing..." (Appellant's Brief, p. 17-18) (***emphasis added***).

Since the Appellant failed to appear for the trial, there can be no question that the Appellant failed to object to Respondent's evidence or argument in the trial court. Such resulted in amendment of the pleadings to conform to the evidence and argument. *See Leahy* and *Murray v. Ray*. Even if it didn't, the failure to amend does not affect the result of the trial on the issue. Rule 55.33(b).

Further, it is important to note that the instant matter was not a default proceeding, in which Rule 55.33 would not apply. *See Jew v. Home Depot USA, Inc.*, 126 S.W.3d 394, 398 (Mo. App. E.D. 2004). The Director in the instant matter filed an answer to the

Petition. It was not a default.

Appellant cites various cases as standing for the proposition that constitutional questions must be raised at the first opportunity. However, Respondent suggests that the requirement of raising constitutional questions at the first opportunity is a rule that is required in order to preserve the question for judicial review. Respondent is not seeking judicial review. Therefore, the rule is inapplicable to Respondent. However, the rule is applicable to the Appellant, and the Appellant failed to raise the issue at its first opportunity - - which was in a motion for new trial.

The trial court in this matter was apprised of the constitutional issue and was able to understand and act on the issue presented. Dye. In fact, the trial court ruled upon the same by finding the subject statute unconstitutional. The matter was before the trial court. What was not before the trial court was the Appellant. The fact that Appellant was not before the trial court is not a reason to convict the trial court of error in hearing the issue as the pleadings were amended. As a result of the foregoing, Appellant's Point II must be denied.

CONCLUSION

Both of Appellant's points should be denied and the trial court's judgment affirmed. Further, the trial court's finding that Section 302.060.1(9) is unconstitutionally vague, although not challenged by Appellant or preserved for review, should be affirmed by this Court.

But, regardless of whether this Court affirms or reverses the vagueness finding, the trial court's judgment ordering the reinstatement of Respondent's driving privilege should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this 12th day of March, 2012, he served a true, accurate and correct copy of the foregoing Respondent's Brief, and Appendix in Wordperfect format 5.x or higher (specifically served in Wordperfect 10), upon Mr. Daniel N. McPherson, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, by electronic mail to Dan.McPherson@ago.mo.gov.

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CERTIFICATE OF COMPLIANCE

I, Paul J. Stingley, MB No. 42015, do hereby certify as follows:

1. The attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 7,300 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Wordperfect software; and

2. On this 12th day of March, 2012, he served a true, accurate and correct copy of the foregoing Respondent's Brief, and Appendix in Wordperfect format 5.x or higher (specifically served in Wordperfect 10), upon Mr. Daniel N. McPherson, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, by electronic mail to Dan.McPherson@ago.mo.gov.

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